United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7608

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FOR THE SECOND CIRCUIT

No. 76-7608

In the Matter of

The Complaint of Tug Helen B. Moran, Inc., as owner, and Moran Towing & Transportation Co., Inc., as chartered owner, of the Tug DIANA L. MORAN for exoneration from or limitation of liability.

Plaintiffs,

MORAN TOWING & TRANSPORTATION CO., INC.,

Plaintiff-Appellant,

STATE OF CONNECTICUT,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-APPELLEE, THE STATE OF CONNECTICUT

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Claimant-Appellee
State of Connecticut
99 John Street
New York, N.Y. 10038

DONALD M. WATSON, JR.
GEOFFREY W. GILL
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authority:

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Issues Presented for Review

1. Where the Tomlinson Bridge, during the entire period of its operation, of necessity opened its leaves to an angle less than required by its permit and this condition was well known to Moran Towing & Transportation

Co.'s pilot; was the District Court clearly erroneous in holding that this condition was not a contributing cause of the collision between an appurtenance upon the deck of the barge and the underside of the northeastern leaf of the Bridge.

2. Where the Tomlinson Bridge's fender system, which was intended to protect river traffic only from contact with the stone abutment, was in poor condition, was the District Court clearly erroneous in finding that this condition was not a contributing cause of the collision between the barge and the northeastern leaf.

Statement of Facts

The bascular bridge which spans the Quinnipiac River at New Haven, Connecticut (hereinafter referred to as the Tomlinson Bridge or Bridge) was built pursuant to permit granted by the United States Army Corps of Engineers in 1922, according to the terms of the River and Harbors Act of 1899 (Exh. 17, E-5-7). The Bridge was completed in 1925. The plans submitted to the Army Corps of Engineers, which are attached to the permit, indicate that the leaves of the Bridge can be raised to an angle of approximately 82° (Exh. 17, E-8). However, the manner in which the Bridge was built rendered impossible raising the leaves to that angle. Since its construction, the leaves of the Bridge had been elevated to an angle of approximately 65° (72a; Exh. 13, E-4).

Moran Towing & Transportation Co.'s tugs had been towing the barge BECRAFT through the Tomlinson Bridge twice a month for a period of about two years prior to this occurrence without incident (87a-88a). The fact that the leaves of the Bridge were raised to an angle of approximately 65° was well know to the Moran pilot, Captain Calain (29a; 63a-64a).

On May 17, 1972, with a slight breeze from the SSW and the last of the flood tide, the Atlantic Cement barge BECRAFT was being towed outbound from the Atlantic Cement dock located on Mill River in New Haven, Connecticut, en route to Ravena, New York (26a). The BECRAFT is 290 feet in length, 55 feet in beam, and 26.8 feet in depth. The barge was drawing about 2′6″ forward and 4′0″ aft (26a). Her deck was therefore about 23′6″ above the water line. The horizontal clearance between the Tomlinson Bridge abutments is about 126 feet (31a). This distance is 71 feet greater than the width of the barge. Immediately prior to the allisions at the Tomlinson Bridge, the flotilla had passed through the Chapel Street Bridge, which has a horizontal clearance of 72 feet (30a), without difficulty. The barge was being towed stern first by the tug DIANA L. MORAN (28a). The tug DEVON, affixed to the rear of the barge, was acting as a rudder.

The captain of the tug DIANA L. MORAN left his tug and took a position about amidship on the deck of the barge BECRAFT. He was in charge of the operation of the flotilla and from this area aboard the barge controlled the maneuvers of both tugs via walkie-talkie radio (29a).

When approaching the Tomlinson Bridge from Mill River, the tug and barge must make an approximate 90° turn to the right (31a, 48a). During the course of this maneuver, the rear of the tow, i.e. bow of the barge since the barge was being towed stern first, swings to the left. Normal procedure requires the Moran pilot to order the stern tug, i.e. the DEVON, to go astern on its engines, thus arresting this swing to the left (31a). When the barge is properly aligned with the Bridge opening, the pilot then orders the stern tug to stop backing, and the flotilla, towed by the lead tug, i.e. the DIANA L. MORAN, proceeds through the opening (32a).

On this passage, the Moran pilot, Captain Calain, failed to realize that he had allowed the barge to swing too far

to the left until the barge was already about a third of the way into the draw (66a). Corrections were then attempted but too late. The barge struck the cribbing or foundation of the Bridge (34a) at the northeast abutment (34a-35a). This contact resulted in the barge "bouncing" off the struck area and moving laterally into the channel (35a, 44a). Notwithstanding the effect of this "bounce", the barge was still too far to the east and as a result, a steel chock mounted on the deck of the barge struck a girder on the underside of the northeast leaf (36a).

The Decision Below

The District Court held that due to the many faults found against Moran, which faults are not contested in this appeal, and because Moran's personnel were well aware of the angle to which the leaves of the Bridge would be elevated long prior to this transit, Moran was solely at fault for permitting the barge BECRAFT to collide with the girder.

The District Court was not clearly erroneous in finding that "any added deflection of the barge that would have resulted from a proper fender system would not have prevented the collision between the chock and the girder" (Op. 101a).

POINT I.

Where the Tomlinson Bridge during the entire period of its operation of necessity opened its leaves to an angle less than required by its permit and this condition was known to the navigators of the Becraft Flotilla, was the District Court clearly erroneous in holding that this condition was not a contributing cause of the collision between an appurtenance upon the deck of the barge and the underside of the northeastern leaf of the bridge?

We reiterate that the Bridge was constructed in 1925, and from that time to the date of the accident the leaves of the Bridge had been raised to an angle of 65°. Moran Towing & Transportation Co. Inc.'s tugs had been towing the barge BECRAFT through the Bridge twice a month for two years prior to the allision. Moran's pilots were well aware of the conditions which they would encounter when navigating the BECRAFT through the Bridge.

In the case of *Seaboard Airline R. Co.* v. *Pan American & Transport Co.*, 199 F.2d 761 [C.A. 5 1952], cert. denied 345 U.S. 909, a tank vessel PAN MARYLAND, while under the command of an experienced pilot, struck the Seaboard drawbridge which crosses the Savannah River. There had been longstanding complaints concerning the bridge's condition and there were "long overdue" corrections that Seaboard should have made which would have aided navigators proceeding through the draw of the bridge. The court found Pan American, as owner of the tank vessel PAN MARYLAND, solely at fault, stating at page 765:

> "When, as the record shows to be the case here, the conditions claimed to be unlawful or negligent are entirely passive and have existed for many years to the knowledge of the moving vessel; when, too, the evidence is, as here, uncontradicted that, while these conditions do tend to make the passage more difficult

than if they did not exist, a passage can be safely made under the conditions if due care is exercised; there is no basis in the record even for a division of the damages in favor of the actively negligent moving vessel, much less for awarding it full damages."

In *The Fort Fetterman* v. *South Carolina State Highway Department*, 177 F. Supp. 76, 278 F.2d 921 [C.A. 4 1960], cert. denied 364 U.S. 910 (1960), the court found that the South Carolina State Highway Department had not constructed its bridge in accordance with the permit issued by the War Department, in that the permit required that the State's bascular bridge spans to open to an angle of 82° but the leaves of the bridge as constructed opened to an angle of only 71°. Nevertheless, the court found that the failure on the part of the State Highway Department to comply with the War Department's permit did not contribute to the allision and resulting damage and held the vessel solely at fault.

In *In Re Great Lakes Towing Company*, 348 F. Supp. 549 (N.D. Ill. E.D. 1972), aff'd 505 F.2d 579 [C.A. 7 1974], a vessel under its own power being assisted by two tugs collided with a single leaf bascular bridge. The court found that the leaf of the bridge had been opened to an angle of 75° rather than the 82° prescribed by the War Department. Once again, the court found that the failure of the bridge owner to comply with the War Department's directive was not a cause of the allision and held the ship solely at fault for the resulting damage.

In *Dow Chemical Co.* v. *Dixie Carriers, Inc.*, 330 F.Supp. 1304 (S.D. Texas 1971), aff'd 463 F.2d 120 [C.A. 5 1972], Dow, as owner of a bridge fender system on Dow's barge canal, sued the bareboat charterer of a tug which brought some barges into collision with the fenders on various dates. Dow had not obtained governmental approval for the construction of the fender system. The lower court

found that Dixie was familiar with the fenders and had navigated past them on many occasions and concluded that the accident would not have occurred in the absence of Dixie's negligence—"and that conclusion inescapably involved an assessment of navigation in the face of well-known conditions imposing no extraordinary hazards or difficulties" (p. 122). In footnote 5 at page 122 the Court of Appeals commented:

> "Dixie's argument confuses negligence with causation. Although it might be argued that Dow's statutory violation rendered it presumptively liable for damages resulting from collision unless it established that the violation could not have caused or contributed to the collision, * * *, that rule 'cannot be pressed to such an extreme as to justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated'. Webb v. Davis, 4 Cir. 1956, 236 F.2d 90, 93."

See also:

> *Beaufort and Morehead R. Co.* v. *Damnyank*, 122 F. Supp. 82 (E.D. N.C. 1954);
> *Spokane P & S Ry Co.* v. *The Fairport*, 716 F. Supp. 549 (D. Ore. 1953).

Moran's contention that the Rule of *The Pennsylvania* is applicable in the instant matter also "confuses negligence with causation". We submit that when a District Court has found that the alleged statutory violation was a condition, not a cause, of the allision the Rule of *The Pennsylvania* should have no applicability.

In *The Aakre*, 122 F.2d 469 [C.A. 2 1941], cert. denied 314 U.S. 690 (1941), this Court, commenting upon *The Pennsylvania* Rule, said at page 474:

> "the history of its application shows that it has done no more than shift the burden of proof with regard to causality".

When a District Court finds, as it did herein, that the alleged negligent act was not a cause of the loss, by implication the court has also concluded that the one committing the statutory fault has met the burden of *The Pennsylvania* Rule.

Even in collision cases where the courts have found that a violation of a statute or regulation is a condition, not a cause of the collision the courts have refused to apply the Rule of *The Pennsylvania.*

In *Matton Oil Transfer Corporation* v. *The Greene,* 129 F.2d 618 (1942), this Court cited the *Pennsylvania* decision saying that a statutory violator must be held responsible unless he proves that the violation could not have contributed to the collision. The Court then continued at page 620:

> "While recognizing this principle, we have often exonerated vessels out of position when it has appeared that 'the * * * fault was a condition, not a cause, of the collision.'" [Citations omitted]

The Court further held that where the fault was visible to the other vessel and "if by proper navigation the other could have avoided the collision, then the offender's fault did not contribute" (p. 620). See also: *The Perseverance,* 63 F.2d 788 [C.A. 2 1933], cert. denied 289 U.S. 744 (1933); *The S.S. Randa,* 56 F. Supp. 508 (S.D.N.Y. 1944); *The Bellhaven,* 72 F.2d 206, 207-8 [C.A. 2 1934].

Moran errs at pages 13-15 of its brief where it argues that the "condition not a cause" doctrine is a creature of maritime collision law designed to "alleviate the harsh consequences of the divided damages rule." To the contrary, this doctrine is a long-standing, well established principle of general tort law:

> "Where two distinct causes, unrelated in operation, contribute to an injury, one of them being a direct cause and the other merely furnishing the condition or giving rise to the occasion by which the injury was

> made possible, the former will *alone* be regarded as responsible for the result." 86 C.J.S. Torts § 30 (emphasis added)

This principle was cited and applied by the Court on the issue of liability in *United States* v. *DeVane,* 306 F.2d 182 [C.A. 5 1962], a non-collision case wherein the supervening cause negated earlier negligence on the part of decedent, with the court commenting:

> "Comparative negligence relates to that negligence which is the proximate concurring cause of the injury." (p. 187)

Prosser in *Law of Torts* (4 Ed. 1971), comments at page 248 that the "condition not a cause" doctrine "must refer to the type of case where the forces set in operation by the [State] have come to rest in a position of apparent safety, and some new force intervenes." That the leaves were in a position "of apparent safety" is established by the numerous incident free transits by the flotilla prior to May 17 1972; the intervening new force was the compounded negligence of the Moran pilot.

POINT II.

Where the Tomlinson Bridge's fender system, which was intended to protect river traffic only from contact with the stone abutment, was in poor condition, was the District Court clearly erroneous in finding that this condition was not a contributing cause of the collision between the barge and the northeastern leaf?

Appellant Moran in its Point II discussion would have this Court wholly disregard the testimony of two expert surveyors "employed by Moran" (Op. 100a), who were called by Moran to testify at trial. Moran now contends that this testimony was "misunderstood" by the trial Court. However, the testimony of surveyors Watkins and Warm is unambiguous and bears directly upon the issue advanced by Moran.

Mr. Watkins testified upon cross-examination:

> "Q. In a previous answer you also stated that you calculated the point of impact and found it to be at least two feet, six inches inside the fender system if a fender system had existed at the time of the collision, is that so? [145]
>
> A. I stated that the point of impact on the girder was approximately two and a half feet on the channel side of the fender rack on that east side.
>
> Q. So as I understand you, then, you are concluding that had the fender system been in place on May 17, 1972, in its entirety, the chock would *still* have collided with the underside of the bridge with the side of the barge at least two feet from the outside of the fender system, is that so?
>
> * * *
>
> The Witness: If the fender system had been intact, the barge chock would have *still* struck the girder." (60a-61a, emphasis added)

Watkins has been a marine surveyor for about 30 years with his work including bridge surveys (53a). He made his first personal on site inspection of the Tomlinson Bridge on May 19, 1972, within two days of the allisions (53a). He was employed (Op. 100a) and called as a witness (53a) by Moran and as such was undoubtedly fully familiar with the facts and circumstances surrounding the two allisions, including the circumstance of the barge striking the underside of the girder after having "bounced" off the abutment. His unambiguous testimony was: "If the fender system had been intact, the barge chock would have still struck the girder" (61a).

Mr. Warm, also employed by Moran as a surveyor in this matter (Op. 100a) and a witness called by Moran at the trial (73a), was, like Mr. Watkins, a marine surveyor who had surveyed bridges and been engaged in this type

of work for 22 years (73a). He had also personally surveyed the Bridge shortly after the allision of May 17, 1972 (73a). Mr. Warm had issued a report based upon his on site inspection. Counsel reading from this report asked these questions as mentioned in Moran's brief on appeal:

> "Q. 'It was noted that the north and center section of the timber fender system were broken out and in places missing. Because of the limited clearance of the span, these fenders lie just outside the face of the bridge and provide only a fender surface between a vessel and the bridge. It appears that the contact with the bridge span may have occurred regardless because of the very high freeboard of the barge. This will be further confirmed.'
>
> Is that your statement?
>
> A. That is correct, in the report.
>
> Q. So was it your opinion that the chock would have contacted the span regardless of the condition of the tender [sic, should read 'fender']?
>
> A. At that time it was" (77a).

This testimony comports with the facts of the case because the barge's freeboard at the time of the second allision was about 23′6″. With this freeboard, the barge's deck towered over the height of the fenders, whatever their condition may have been. This is clear from Exhibit 37 (p. E-14 of the Joint Exhibit Volume) which shows the damaged area of the girder high over the fender.

Moran belatedly comments that neither witness was asked certain questions at trial, questions which Moran now not only raises for the first time but to which suggests answers, unsupported by the record. The State submits that should witness' examination be considered incomplete in any respect by counsel, the time and place for this omission to be remedied is at the trial court level, and particularly by the party calling the witness. The State further submits that these witness' responses are neither

incomplete nor ambiguous; Judge Lasker did not err in finding from their testimony that

> "any added deflection of the barge that would have resulted from a proper fender system would not have prevented the collision between the chock and the girder" (Op. 100-101a)

Indeed, he merely agreed with and found credible Moran's two expert surveyors.

Two other factors also bear upon this issue raised by Moran. There is no evidence concerning the *actual* distance into the channel the BECRAFT would have been "bounced" had she been brought against a fully repaired fender system at the point of initial contact; even Moran suggests no actual "bounce distance". Indeed, it is quite conceivable that a light barge striking a yielding wooden fender system with an inherent cushioning factor would be deflected considerably less distance than if she contacted a non-yielding stone abutment. Captain Calain testified that the barge was deflected "quite a distance" off the abutment (35a). Also, there has been no evidence that a fender of the type at issue is intended to serve as a deflector of vessels away from parts of a structure other than the part to which it is affixed. In fact, the Bridge owner's duty as to protection offered by fenders is limited, concerning the Bridge, to its piers and abutments. *Complaint of Wasson,* 495 F.2d 571, 578 (C.A. 7 1974) and cases cited thereat. There is no suggestion other than in Moran's brief that fenders on the abutment are intended to protect the leaves of the Bridge. The fender on the northeast abutment was admittedly in a poor state of repair. The State of Connecticut does not dispute the Court's finding against the State for half damages on the matter of damages sustained by the barge as the result of the first allision. The State does however take issue with Moran endeavoring at this point to expand the function of the

fender system to the end of creating within the system a function of "bouncing" vessels clear of other components of the Bridge structure of which the fenders are not a part and not intended to protect.

This Court is now asked to *infer* what may have happened to the barge under a different set of circumstances and asked to come to a conclusion different from that arrived at by Moran's own two experts testifying as to events as they were. Considering the record upon appeal, there is an absence of any evidence on how far the barge may have rebounded into the channel had she been brought against a wooden fender system rather than the stone abutment. What Moran seeks is improper. "Inferences may be drawn only when there are proven facts in evidence upon which the inferences can be soundly based." *Thomas* v. *Young,* 282 F. Supp. 52, 55 (E.D. Wis. 1968). And in *Kenny* v. *Washington Properties,* 128 F.2d 612, 615 (Cir. D.C. 1942), the Court stated, "We have often said that, while a satisfactory conclusion may be reached through an inference from established facts, there must still be facts proved from which the inference can be drawn. No inference of fact may be drawn from a premise which is wholly uncertain." See also *Tyrrell* v. *Dobbs Investment Co.,* 337 F.2d 761, 765 (C.A. 10 1964). As to Judge Lasker's proper inferences drawn from the testimony of Moran's own two witnesses, this Court's attention is respectfully directed to Judge Frank's comments concurring in part and dissenting in part from the majority opinion in *Wabash Corp.* v. *Ross Electric Corp.,* 187 F.2d 577, 601 (C.A. 2 1951), cert. den. 342 U.S. 820 (1951) and, additionally, *American Tobacco Co.* v. *The Katingo Hadjipatera,* 194 F.2d 449, 451 (C.A. 2 1951), cert. den. 343 U.S. 978.

CONCLUSION

The opinion of the District Court should be affirmed in all respects.

Dated: New York, N.Y., March 7, 1977.

Respectfully submitted,

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for the Claimant-Appellee
State of Connecticut

DONALD M. WAESCHE, JR.
GEOFFREY W. GILL
Of Counsel

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APPENDANT